

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL L. BEST,) No. C 02-2113 JSW (PR)
Petitioner,)
v.)
DIRECTOR, CALIFORNIA) **ORDER DENYING PETITION FOR
DEPARTMENT OF
CORRECTIONS,) A WRIT OF HABEAS CORPUS
Respondent.)**

Michael L. Best (“Petitioner”), a California prisoner proceeding pro se, filed this habeas corpus petition pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the petition should not be granted. Respondent filed an answer supported by a memorandum and exhibits, and Petitioner filed a traverse as well as a memorandum of points and authorities in support of the traverse. Because Respondent’s answer failed to address two of Petitioner’s claims, the Court ordered further briefing. Respondent then filed a supplemental answer addressing the previously overlooked claims, and Petitioner filed a supplemental traverse. Petitioner also filed a motion to expand the record, which the Court provisionally granted, and to which Respondent has raised objections. For the reasons discussed below, the petition is denied on the merits.

PROCEDURAL BACKGROUND

In 1998, a jury in Alameda County Superior Court convicted Petitioner of robbery (Count One) with findings that he inflicted great bodily injury on the victim, that she was over 65 years of age and that Petitioner knew or should have known that the victim was 65 years of age or older. The jury also found guilty on a separate count of attempted robbery (Count Two). In a bifurcated proceeding, the jury found six prior "strike" convictions to be true. With these prior convictions serving as enhancements, the trial court sentenced Petitioner to a term of 65 years to life in state prison. Petitioner filed a direct appeal and the California Court of Appeal affirmed the judgment of the trial court in an unpublished decision on May 8, 2000. (Answer, Ex. 6.) Petitioner then appealed to the Supreme Court of California, which denied the petition for review without comment on July 26, 2000. *Id.*, Ex. 8. After filing state habeas petitions in the Superior Court and the Court of Appeal, Petitioner filed a habeas petition in the California Supreme Court, which summarily denied the petition without citation or comment on April 17, 2002. *Id.*, Exh. 10.

Petitioner filed this action on April 30, 2002. His federal habeas petition contains four claims for relief: First, he alleges that he was deprived of effective assistance of counsel where his trial counsel failed to suppress a tainted and suggestive identification; failed to interview or call known alibi witnesses; failed to defend against the use of prior convictions as sentence enhancers; and failed to move to excuse a juror for misconduct. Second, Petitioner claims ineffective assistance of appellate counsel for failure to raise the issues relating to his trial counsel on appeal. Third, Petitioner contends that his trial was fundamentally unfair as a result of the trial court's failure to grant his motion to sever the two counts brought against him. Fourth, Petitioner alleges that the admission at trial of evidence linking Petitioner to criminal activity was prejudicial error. Petitioner brought his third and fourth claim on direct appeal, and received a written decision by the California Court of Appeal. This Court finds that Petitioner is not entitled to habeas relief on any of his claims, and denies the petition in its entirety.

FACTUAL BACKGROUND¹

On August 11, 1997, at approximately 3:30 p.m., Elaine Goodman, who was 74 years old, was walking on MacArthur Boulevard toward Maybelle Avenue in Oakland. She saw a man up ahead who had just missed a bus. The man walked toward her and grabbed her purse which she was carrying in her left hand. He took hold of the handle of the purse and pulled hard. Goodman held on to her purse and fell hard to the ground. She felt hurt but continued to hold on to her purse. The assailant continued to struggle with her and dragged her on the sidewalk about three to four feet. He managed to get the purse away from Goodman and fled. Goodman suffered fractures to her left shoulder and arm and was hospitalized for six days. A couple of weeks after the incident, Goodman attended a lineup and identified Petitioner as the perpetrator of the robbery.

At about 2:00 p.m. on August 26, 1997, Grace Kanouse was walking on Redding Street pushing a shopping cart, having just left the Lucky store. As she walked toward 39th Avenue, a young woman approached her and asked Kanouse if she could help her. Kanouse thanked her and declined. The young woman walked past Kanouse and then Kanouse heard her say, "Just a minute." Kanouse stopped. The young woman came back to her, grabbed for her cane and then started to pull at Kanouse's purse. Kanouse screamed for help and a couple from across the street yelled, "Leave her alone." The young woman continued to hit Kanouse a couple of times and then started to walk toward 38th Avenue.

Officer Wolvington was on a bicycle at the intersection of 39th Avenue and MacArthur when he heard screaming from the area of 39th and Redding. He responded and saw an African-American woman striking Kanouse. By the time he arrived at the scene, however, the African-American woman was fleeing. Kanouse pointed her out, telling Wolvington that the woman had just tried to take her purse. Wolvington saw the African-American woman get into the passenger side of a car. Wolvington, riding his

¹ This summary of facts is derived from the opinion of the California Court of Appeal. *See Answer, Ex. 6 ("May 8, 2000 slip op.").*

1 bicycle, pursued the car and radioed for assistance. During the pursuit, he observed that
2 the driver was arguing with the passenger. The driver noticed Wolvington for the first
3 time and sped away. Wolvington could not keep up with the car and broadcast over the
4 radio that the car was heading towards the freeway. Kanouse later identified Philana B. as
5 the woman who tried to steal her purse.

6 Officer Morse heard Wolvington's broadcast and drove onto the freeway where he
7 saw the car. Another police car was already pursuing the car. In response to police
8 pursuit, the car pulled over and stopped. Morse identified Petitioner as the driver of the
9 car. Morse took custody of the female passenger and placed her in the back seat of the
10 police car. When Morse asked her for name and birthdate, she responded that Petitioner,
11 her father, wanted some money so he made her steal the lady's purse. Morse spoke to
12 Petitioner who was handcuffed and in the back seat of Officer Perez's police vehicle.
13 Morse asked Petitioner if he had any information about homicides that he might use to his
14 benefit in this case. Petitioner told him that he knew where a gun was hidden that was
15 used in a murder.

16 Wolvington spoke to Petitioner about the gun. Petitioner led Wolvington to the gun
17 that was used in a murder. He told Wolvington that he had just gotten out of jail and did
18 not want to go back.

19 Philana B., who was almost 17 years old at the time of the incident, testified that
20 she is Petitioner's daughter. She testified that she was convicted of the attempted robbery
21 of Kanouse. She was committed to the California Youth Authority and was currently in
22 the Vision Quest program as part of that commitment. She recanted her earlier statements
23 to the police that Petitioner told her to rob Kanouse and testified at Petitioner's trial that
24 the robbery was her idea.

25 Carolyn Hubbard, an employee of Vision Quest who accompanied Philana to the
26 trial, testified that Philana had earlier told the prosecutor that she and her father planned
27 the robbery.

28 Officer Yoell testified that Philana waived her Miranda rights and told him that on

1 the day of the incident, Petitioner was angry with her, he struck her in the eye and
2 demanded that she get in the car with him to do some "street" robberies. When they were
3 in the car, Petitioner pointed out Kanouse and told her to take Kanouse's purse.

4 Yoell further testified that he noticed similarities between the Kanouse attempted
5 robbery and the Goodman robbery—Petitioner's physical description matched that of the
6 perpetrator of the Goodman robbery, the incidents occurred within two blocks of each
7 other and they were both daytime purse snatchings of elderly victims. Yoell therefore
8 arranged a physical lineup for the Goodman robbery; Goodman identified Petitioner.

9 STANDARD OF REVIEW

10 This Court may entertain a petition for a writ of habeas corpus "in behalf of a
11 person in custody pursuant to the judgment of a state court only on the ground that he is in
12 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
13 § 2254(a); *Rose v. Hodes*, 423 U.S. 19, 21 (1975). The petition in this case was filed
14 after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996
15 (AEDPA), so the provisions of that act apply to it. *See Lindh v. Murphy*, 521 U.S. 320,
16 327 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499-1500 (9th Cir.1997) ("justice and
17 judicial economy are better served by applying the Act to cases filed after the enactment
18 date"), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997). Under the
19 AEDPA a district court may not grant a petition challenging a state conviction or sentence
20 on the basis of a claim that was reviewed on the merits in state court unless the state
21 court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or
22 involved an unreasonable application of, clearly established Federal law, as determined by
23 the Supreme Court of the United States; or (2) resulted in a decision that was based on an
24 unreasonable determination of the facts in light of the evidence presented in the State court
25 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
26 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2001),
27 while the second prong applies to decisions based on factual determinations, *Miller-El v.*
28 *Cockrell*, 537 U.S. 322, 340 (2003).

For the Northern District of California

1 A state court decision is “contrary to” Supreme Court authority, that is, falls under
2 the first clause of § 2254(d)(1), only if “the state court arrives at a conclusion opposite to
3 that reached by [the Supreme] Court on a question of law or if the state court decides a
4 case differently than [the Supreme] Court has on a set of materially indistinguishable
5 facts.” *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an “unreasonable
6 application of” Supreme Court authority, falls under the second clause of § 2254(d)(1), if
7 it correctly identifies the governing legal principle from the Supreme Court’s decisions but
8 “unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. The
9 federal court on habeas review may not issue the writ “simply because that court concludes
10 in its independent judgment that the relevant state-court decision applied clearly
11 established federal law erroneously or incorrectly.” *Id.* at 411. Rather, the application
12 must be “objectively unreasonable” to support granting the writ. *See id.* at 409.

13 “Factual determinations by state courts are presumed correct absent clear and
14 convincing evidence to the contrary.” *Miller-El*, 537 U.S. at 340. This presumption is not
15 altered by the fact that the finding was made by a state court of appeal, rather than by a
16 state trial court. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Bragg v. Galaza*, 242 F.3d
17 1082, 1087 (9th Cir.), *as amended*, 253 F.3d 1150 (9th Cir. 2001). A petitioner must
18 present clear and convincing evidence to overcome § 2254(e)(1)’s presumption of
19 correctness; conclusory assertions will not do. *Id.*

20 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual
21 determination will not be overturned on factual grounds unless objectively unreasonable in
22 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340;
23 *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

24 To determine whether habeas relief is warranted, a federal court looks to the
25 decision of the highest state court to address the merits of a Petitioner’s claim in a reasoned
26 decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000); *see Packer v. Hill*,
27 291 F.3d 569, 578-79 (9th Cir.) (where State Supreme Court denied habeas petition
28 without comment federal court looks to last reasoned decision of a state court as the basis

1 of the state court's judgment), *rev'd on other grounds by Early v. Packer*, 537 U.S. 3
2 (2002). Where the state court reviews a Petitioner's federal claim on the merits but gives
3 no reasoned explanation of its decision and there is no reasoned lower court decision on
4 the claim, the district court applies the deferential standard of 28 U.S.C. § 2254(d) to the
5 state court's determination but must review the record independently to decide whether the
6 state court's decision was objectively reasonable. *See Himes v. Thompson*, 336 F.3d 848,
7 853 (9th Cir. 2003).

DISCUSSION

I. Ineffective Assistance of Trial Counsel

In Claim One of his petition for federal habeas relief, Petitioner claims that his trial counsel, Lorna Brown ("Brown"), provided ineffective assistance in violation of the Sixth Amendment. He bases his claim on Brown's failure to challenge the victim's identification, her failure to investigate and produce certain defense witnesses, her failure to challenge Petitioner's prior convictions at sentencing, and failing to seek removal of a juror for misconduct. Petitioner is not entitled to habeas relief on these claims.

A. Legal Standard

A violation of the Sixth Amendment right to counsel based on trial counsel's ineffectiveness requires a showing that counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 686-93 (1984). To establish the first prong that counsel's performance was deficient, Petitioner must show that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In assessing counsel's performance, the relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were

1 reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Where there
2 are indicia of counsel's tactical reflection on the issue, judicial scrutiny of counsel's
3 performance is deferential, with a presumption that counsel's conduct falls within the wide
4 range of reasonable professional assistance. *See United States v. Palomba*, 31 F.3d 1456,
5 1466 (9th Cir. 1994); *see also Strickland*, 466 U.S. at 689. Prejudice exists if there is a
6 reasonable probability, in other words a probability sufficient to undermine confidence in
7 the trial's outcome, that but for counsel's unprofessional errors, the result of the
8 proceeding would have been different. *Id.* at 694.

9 **B. Analysis**

10 In the absence of a reasoned decision by a state court addressing Petitioner's
11 ineffective assistance of counsel claim, the Court must conduct an independent review of
12 the record to ascertain whether the state court denial of this claim was objectively
13 unreasonable. *Himes*, 336 F.3d at 853.

14 **1. Failure to Challenge Identification**

15 Petitioner first asserts that his trial counsel's performance was deficient because she
16 failed "to suppress the in-court identification of Ms. Goodman." (Traverse, 6.) In support
17 of this claim, Petitioner argues that the lineup at which Goodman identified him was
18 impermissibly suggestive, and as a result, Goodman's in-court identification was tainted.
19 Because this court finds that the pretrial lineup was not unduly suggestive, there was no
20 impermissible "taint" and Petitioner's counsel was not deficient in failing to suppress the
21 lineup identification or either of the subsequent identifications at the preliminary hearing
22 and trial. *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) (counsel's failure to make a
23 motion to strike is not ineffective assistance if such a motion would be futile).

24 Due process protects against the admission of evidence deriving from suggestive
25 pretrial identification procedures. *See Neil v. Biggers*, 409 U.S. 188 (1972). Identification
26 testimony is inadmissible as a violation of due process only if (1) a pretrial encounter is so
27 impermissibly suggestive as to give rise to a very substantial likelihood of irreparable
28 misidentification, and (2) the identification is not sufficiently reliable to outweigh the
corrupting effects of the suggestive procedure. *See Van Pilon v. Reed*, 799 F.2d 1332,
1338 (9th Cir. 1986).

Having thoroughly reviewed the record, this court cannot agree with Petitioner that his pretrial lineup was unduly suggestive. Ms. Goodman's original description of her assailant, as reported to police a few hours after the incident, described a black man, 30-35 years old, approximately 5' 11" and 160 lbs, with short hair, a medium complexion and no facial hair. It is undisputed that Petitioner, who is 6' 2", was 40 years old and wore facial hair in the form of a goatee at the time these crimes were committed. Petitioner argues that he does not physically match this original description, except that he is also "tall, thin, black and over 30." Traverse at 17, n.2. However, the discrepancies between Petitioner and the victim's original description are irrelevant to Petitioner's claim that the lineup was unduly suggestive. An identification procedure is impermissibly suggestive when it emphasizes the focus upon a single individual thereby increasing the likelihood of misidentification. *See Bagley*, 772 F.2d at 493; *see, e.g., United States v. Burdeau*, 168 F.3d 352, 357-58 (9th Cir. 1999) (finding that photo placement, hue and facial expression were insubstantial differences between defendant's photograph and the others in a photographic array and did not create an impermissible suggestion that defendant was the offender). The proper question, then, is whether the procedure at the lineup "emphasize[d] the focus" upon Petitioner to the exclusion of the other men in the lineup. *See, e.g., United States v. Montgomery*, 150 F.3d 983, 992-93 (9th Cir. 1998) (showing witness photographs of defendant, giving witness own copy of photograph of defendant and allowing witness to view defendant in courtroom day before witness testified found suggestive); *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (identification procedures not unnecessarily suggestive where witness failed to identify defendant from photo spread but later made positive identification at pretrial suppression hearing which defendant voluntarily attended).

There was abundant evidence that the lineup was not suggestive. After Petitioner was apprehended at the scene of the Kanouse robbery, Oakland police officer Yoell noted the similarities between the Kanouse purse snatching and the Goodman robbery that had occurred a little over two weeks earlier. Officer Yoell then invited Goodman to come down to the station for a lineup. At no time prior to the lineup did Goodman see Petitioner, nor was she shown a photograph of him. Petitioner was allowed to choose the

1 other men to stand in the lineup and arrange their order in line. Six men were placed in the
2 lineup, with Petitioner at the fourth position. At trial, Petitioner was allowed to and did
3 cross-examine the victim about her pretrial and trial identifications of Petitioner and was
4 allowed to and did cross-examine Officer Yoell about his preparation of the physical
5 lineup. Officer Yoell testified that he followed protocol in setting up the lineup, including
6 reading standard instructions to Goodman directing her how to indicate whether she saw
7 her assailant, did not see her assailant, or was unsure.² (Rep. Tr. 458.) He specifically
8 denied that he indicated to Ms. Goodman in any way that he believed her assailant to be in
9 the lineup. *Id.* at 455, 469.

10 The only argument Petitioner makes to support an inference that this was a
11 suggestive lineup is the matter of his relative age and height. Petitioner was neither the
12 shortest nor the tallest man at the lineup. At 40, Petitioner was, however, the oldest. The
13 ages of the other men ranged from 18 to 38. Because the man closest to Petitioner in age,
14 at 38, was only 5'8" tall, Petitioner asserts that this emphasized the focus on him.
15 However, Ms. Goodman had originally described her assailant as 5' 11" and between 30
16 and 35 years of age. Both men were 3 inches off the indicated height, and Petitioner was
17 further from the indicated age range than the shorter man. The lineup was clearly not an
18 instance in which an individual who matches the victim's original description is placed
19 among others who do not. Moreover, this court finds that Petitioner did not "so obviously
20 stand out as to create a substantial likelihood of misidentification." *Van Tran v. Lindsay*,
21 212 F.3d 1143, 1156 (9th Cir. 2000), *overruled in part on other grounds by Lockyer v.*
22 *Andrade*, 538 U.S. 63 (2003).

23 Petitioner has not established that the lineup proceeding in which Ms. Goodman
24 identified him as the man who robbed her was impermissibly suggestive.³ Accordingly,

25 ² In fact, Officer Yoell testified that Goodman appeared quite confident in
26 identifying Petitioner at the lineup. She immediately placed two "x" marks on the
27 identification card to indicate Petitioner. When asked why she indicated Petitioner, she
responded "Because that's him." (Rep. Tr. 459.) *See also* Rep. Tr. 270 (Goodman
testimony).

28 ³Because the lineup was not unduly suggestive, it is not necessary to consider whether,
under *Neil v. Biggers*, the in-court identifications were independently reliable. 409 U.S. 188
(1972).

1 neither the identification at the preliminary hearing nor that at trial was “tainted,” and
 2 Petitioner’s counsel was not ineffective for failing to suppress these identifications.⁴

3 **2. Failure to Investigate and Present Alibi and Defense Witnesses**

4 Petitioner complains that Brown failed to investigate and present alibi witnesses. As
 5 discussed below, Petitioner fails to demonstrate either that Brown’s performance was
 6 deficient or prejudicial.

7 The Ninth Circuit has found a violation of the Sixth Amendment guarantee to
 8 effective assistance of counsel based on counsel’s failure to investigate or present
 9 testimony from an available witness where such testimony would corroborate the
 10 defendant’s testimony. *See, e.g., Luna v. Cambra*, 306 F.3d 954, 961-67 (9th Cir. 2002)
 11 (finding deficient performance and prejudice where counsel failed to investigate and
 12 present testimony of corroborating alibi witnesses where defendant’s only defense was his
 13 own testimony that he was home asleep at the time of the crime); *Lord v. Wood*, 184 F.3d
 14 1083, 1093-96 (9th Cir. 1999) (finding deficient performance where counsel failed to
 15 personally interview and put on the stand three possible alibi witnesses who would have
 16 testified that they saw the victim alive the day after she purportedly was murdered); *Brown*
 17 v. *Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998) (finding failure to investigate and present
 18 alibi witnesses to be deficient performance and prejudicial where, without corroborating
 19 witnesses, defendant’s defense rested only on his own bare testimony).

20 **a. Alibi Witnesses**

21 At trial, Frederick McGowan testified as an alibi witness, stating that Petitioner was
 22 at the “Victory Outreach Man’s Home,” a rehabilitation residence, on August 11, 1997 at
 23 sometime after two o’clock in the afternoon. (Rep. Tr. 610-13.) McGowan testified that
 24 he remembered returning from a conference two days before, and that on Monday, August
 25 11, 1997, he opened the gate for Petitioner who did not have his key. In closing, Brown
 26 argued that McGowan did his best to testify truthfully as to what he remembered from that

27 ⁴In his initial petition, Petitioner appears to challenge the pretrial lineup on the
 28 additional ground that it was conducted without counsel. Later, Petitioner clarifies that this
 claim is not based on a denial of counsel at the pretrial lineup, but is rather a challenge to an
 “in-court identification tainted by, and not independent of, a lineup identification resulting
 from/under impermissibly suggestive circumstances.” Traverse at 8.

1 day.

2 In his habeas petition, however, Petitioner claims that he was tutoring children at the
3 home of Pastor Demas Pena on August 11, 1997 at the time that the Goodman robbery
4 (Count One) occurred, which was approximately 3:30 pm. (Pet. 4c.) Petitioner contends
5 that Pastor Pena's wife had informed Michael Rosenblum, the defense investigator, of this
6 fact. Petitioner also contends that he told trial counsel that several members of Philana
7 B.'s family informed him that Philana's boyfriend, Johnny Douglas, was the true
8 perpetrator who actually robbed Goodman and that Douglas hid items from the robbery at
9 the home of Maria Henry, Philana's mother and Petitioner's ex-wife. *Id.* Petitioner
10 remarks that Douglas physically resembles himself in height. *Id.* In support of these
11 assertions, Petitioner submitted affidavits and other documents pursuant to his motion to
12 expand the record, which the Court granted (docket no. 36).⁵ Petitioner also argues that
13 Philana and Douglas had committed robberies together prior to her arrest for the Klanouse
14 robbery (Count Two). (Pet. 4c.)

15 Brown's attempt to present an alibi defense at trial does not demonstrate deficient
16 performance as required under *Strickland*. Brown clearly made a conscious tactical
17 decision to introduce McGowan's testimony to support an alibi defense. Furthermore,
18 Petitioner's proposed alibi theory presented in his petition, *viz.*, that he was tutoring
19 children at Pena's home at the time of the Goodman robbery, directly contradicts the alibi
20 presented at trial, *viz.*, that he was at the Victory Outreach home. Having reasonably
21 selected an alibi defense as the primary defense theory, Brown was not under a duty to
22 investigate a conflicting alibi defense. *See Williams v. Woodford*, 384 F.3d 567, 611-12
(9th Cir. 2004).

23 The Court further concludes that Petitioner was not prejudiced by Brown's failure to
24 investigate his alternate alibi theory, and thus fails to demonstrate ineffective assistance of
25 counsel. Petitioner has proffered affidavits that purport to support his contention that he

26
27 ⁵ Respondent has lodged objections to Petitioner's expansion of the record
28 (docket no. 38). In the interest of avoiding the necessity of a full evidentiary hearing, the
Court takes the permissible intermediate step of expanding the record with documentary
evidence. *Williams v. Woodford*, 384 F.3d 567, 590-91 (9th Cir. 2004). Respondent's
objections are therefore overruled.

1 was at Pena's home on August 11, 1997. However, none of these affidavits establish
2 Petitioner's presence there on that date. His parole officer, Muriel Martin, states that she
3 personally visited the Pena residence on August 7 and 14, 1997, and observed that
4 Petitioner had taken up residence in their home and at Victory Outreach. (Traverse, Ex.
5 C3.) Martin does not, however, state that she saw Petitioner there on August 11, the date
6 of the Goodman robbery. Similarly, Pastor Jeff Fowler's affidavit states that Petitioner
7 was a resident at Victory Outreach in 1997, but does not attest to Petitioner's whereabouts
8 on August 11. *Id.*, Ex. A6. Petitioner's contention that Mrs. Pena informed the defense
9 investigator that Petitioner was at her home at the time of the Goodman robbery is not
10 substantiated by the expanded record in the absence of an affidavit by Mrs. Pena. *See*
11 *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir.), *cert. denied*, 531 U.S. 908 (2000) (no showing
12 of ineffective assistance where no evidence in the record suggests that alleged alibi
13 witness exists and petitioner did not present affidavit from the witness to show that
14 witness would have presented helpful testimony). Thus, there is no reasonable probability
15 that, but for Brown's failure to investigate the alleged alibi witnesses, the result of the trial
16 would have been different. *Strickland*, 466 U.S. at 694.

6 **b. Hearsay Witnesses about Other Suspect**

7 Petitioner further contends that he informed trial counsel that Philana's grandmother,
8 aunt, mother, and cousin told him that Philana's boyfriend and the father of her child,
9 Johnny Douglas, was the person who robbed Goodman and that Douglas hid items from
10 the robbery in the home of Maria Lisa Henry, Philana's mother and Petitioner's ex-wife.
11 Petitioner has submitted affidavits by Maria Lisa Henry (Traverse, Ex. A3); Juliet Stern,
12 Philana's aunt, *id.*, Ex. A4; and Jaunice Henry, Philana's grandmother, *id.*, Ex. A5. Each
13 of those affidavits relates to hearsay statements by Philana to Maria Lisa Henry that
14 Douglas robbed an elderly woman, later identified as Goodman, and suggest that Douglas
15 and/or Philana committed other crimes.

16 Petitioner also submits an affidavit by his mother, Novella Benton, stating that "in
17 the year of 1998 as my son was going to trial for the matter he is now serving a 65 year to
18 life sentence for, that I informed my sons [sic] attorney Ms. Lorna Brown, that the
19 grandmother of the minor child involved with this matter name: Jaunice Henry informed

me via telephone that her and her daughter Lisa Henry (mother of minor child [Philana]) could identify the male person really involved with crimes being committed in the past with the minor child Philana Best." *Id.*, Ex. B1. Petitioner also offers evidence of Douglas' subsequent criminal activity.⁶ The proffered arrest reports dated October 12, 2002 and November 5, 2002 describe Douglas as a Black male, age 22, six feet four inches tall, weighing 220 pounds, with a date of birth as August 26, 1980. (Traverse, Exs. D6 and D28.)

Petitioner has not provided reliable evidence to show that Douglas was the perpetrator of the Goodman robbery and that Brown was deficient in failing to investigate that defense theory. The Ninth Circuit has recognized that under California law, "evidence of third-party culpability is inadmissible 'if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense.'" *Perry v. Rushen*, 713 F.2d 1447, 1449 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). The Ninth Circuit held that "[w]hen due process issues are presented, the court must balance the importance of the evidence against the state interest in exclusion," namely, to place reasonable limits on collateral issues and to avoid unsupported jury speculation about the guilt of other suspects. *Id.* at 1452-53.

Here, Petitioner's proffered hearsay evidence of Philana's statement to her mother implicating Douglas is not sufficiently weighty and probative to substantiate the collateral issue of third party culpability. Petitioner offers no compelling evidence such as a third party confession, *see id.* at 1452, or "a train of facts or circumstances" tending to point to Douglas as the guilty party. *Jones v. Wood*, 207 F.3d 557, 562 (9th Cir. 2000) (finding

⁶ Respondent objects to the expansion of the record to include these affidavits and police records, arguing that these documents constitute new evidence relative to Petitioner's ineffective assistance claim, none of which was presented to the state court. (Obj. to Order Granting Pet's Mot. to Expand R., 1-2.) In order to properly exhaust, the specific factual basis of the federal claim must be presented to the highest state court. *See Kelly v. Small*, 315 F.3d 1063, 1067-69 (9th Cir.) (finding unexhausted ineffective assistance of counsel and prosecutorial misconduct claims where specific instances of ineffectiveness and misconduct asserted in federal petition were neither in the California Supreme Court petition nor discussed by the court of appeal), *cert. denied*, 538 U.S. 1042 (2003). Even if it is unexhausted, however, the Court may deny the petition on the merits. *See* 28 U.S.C. § 2254(b)(2).

1 under Washington law that petitioner was entitled to present evidence of third party
2 culpability where prosecution's case was almost entirely circumstantial). Furthermore,
3 Petitioner's proffer of documentary evidence does not implicate Douglas as the actual
4 perpetrator of the Goodman robbery. For example, Petitioner's suggestion that Goodman
5 mistakenly identified him as the suspect because of his physical resemblance to Douglas is
6 unsupported by evidence that she described the robber as thirty to thirty-five years old.
7 (Clerk Tr. 83.) Based on the date of birth recorded in his arrest reports, Douglas would
8 have been almost seventeen years old at the time the Goodman robbery was committed on
9 August 11, 1997 and was unlikely to have been mistaken for a thirty to thirty-five year-old
man. *See* Traverse, Exs. D6 and D28.

10 Petitioner has failed to demonstrate that Brown's performance was deficient for
11 failing to investigate Douglas as an alternate suspect in the Goodman robbery. The state
12 court's denial of Petitioner's ineffective assistance of counsel claim was not contrary to, or
13 an unreasonable interpretation of, established Supreme Court precedent. Petitioner's claim
is therefore denied.

5 **3. Failure to Challenge Evidence of Prior Convictions**

6 Petitioner argues that the use of prior convictions to enhance his sentence was in
7 error, and that his trial counsel acted unreasonably in failing to challenge the use of these
8 convictions in the second phase of the bifurcated trial.

9 First, Petitioner contends that there was insufficient evidence of the six prior felony
10 convictions for the purpose of sentencing enhancement, and were not brought and tried
11 separately as required by California Penal Code § 667(a), which provides that a five-year
12 enhancement shall be imposed for each prior conviction of a serious felony. (Pet. 3e.)
13 The record reflects that the state introduced certified court records showing that Petitioner
14 pled guilty to each of the alleged prior offenses in 1982 and 1988. (Answer, Ex. 1 (Clerk
15 Tr.) at 253-54; Ex. 2L (Rep. Tr.) at 757-70.) Because this evidence of prior convictions
16 was presented to and decided by a jury in a bifurcated proceeding, Brown's performance
17 was not deficient for failing to challenge the trial of the prior convictions at sentencing.

18 Second, Petitioner argues that the prior plea agreements were unlawful because there
19 was no legal basis for bypassing the prohibition on plea bargaining pursuant to section

1 1192.7(a) of the California Penal Code. That provision states in part that “[p]lea
2 bargaining in any case in which the ... information charges any serious felony ... is
3 prohibited, unless there is insufficient evidence to prove the people’s case.” Cal. Penal
4 Code § 1192.7(a). Petitioner claims that trial counsel failed to investigate the validity of
5 the alleged priors, and if she had done so, the trial court would have found the priors to be
6 invalid for sentencing enhancement under § 667 of the California Penal Code, which
7 provides for a five-year sentence enhancement for a prior conviction of a serious felony.
(Pet. 3f.)

8 Petitioner refers to an unpublished, noncitable opinion of the California Court of
9 Appeal, *People v. Delgado*, 2001 WL 1330195 (Cal.App. 4th Dist.), to support his
10 contention that his prior plea agreements were invalid under § 1192.7(a) of the Penal
11 Code. In *Delgado*, the Attorney General challenged the guilty plea for voluntary
12 manslaughter entered by defendant, arguing that the deputy district attorney was prohibited
13 under § 1192.7(a) from engaging in a plea bargain because there was sufficient evidence
14 to convict of murder. The Court of Appeal affirmed the guilty plea, accepting the deputy
15 district attorney’s contention that there was insufficient evidence to obtain a conviction.
16 *Id.* The Court of Appeal noted there that “Penal Code section 1192.7 places restrictions on
17 all parties in the criminal justice system . . . to protect the public’s interest in ‘vigorous
18 prosecution of the accused’” *Id.* at *2 (citation omitted).

19 Here, Petitioner fails to demonstrate how any of his prior plea agreements are
20 invalidated by this statutory provision, which “is clearly designed to protect the public and
21 not defendants.” *People v. Gonzalez*, 188 Cal. App. 3d 586, 590 (Cal. App. 5th Dist.
22 1986). Nor does he suggest that the state courts overlooked the alleged invalidity upon
23 approving each of those plea agreements. *See In re Alvernaz*, 2 Cal. 4th 924, 941 (1992)
24 (“a plea bargain is ineffective unless and until it is approved by the court”). Trial counsel
25 did not act unreasonably by not challenging the prior convictions under section 1192.7(a)
26 of the Penal Code.

27 Third, Petitioner claims he was denied effective assistance of counsel “at the time of
28 both alleged prior plea agreements” for failure to file a notice of appeal on whether those
plea agreements were constitutionally valid under section 1192.7(a) of the Penal Code.

(Pet. 3e-3f.) Petitioner may not challenge his prior plea agreements on his petition for relief from the state court judgment on the current commitment offense. *See* 28 U.S.C. § 2254(a). To the extent that Petitioner claims that Brown was ineffective at sentencing for failing to challenge the prior plea agreements on the ground of ineffective assistance, Brown did not fall below an objective standard of reasonableness because there was no basis to challenge the prior plea agreements under section 1192.7(a). *Strickland*, 466 U.S. at 687-88. Petitioner is not entitled to habeas relief on these grounds.

4. **Failure to Challenge Juror for Misconduct**

Finally, Petitioner complains that his trial counsel acted unreasonably by failing to challenge a juror for misconduct after the juror admitted to reading the headline of a newspaper article concerning Petitioner's case.

a. **Legal Standard**

The Sixth Amendment guarantee of a trial by jury requires the jury verdict to be based on the evidence presented at trial. *See Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Jeffries*, 114 F.3d at 1490. Evidence not presented at trial is deemed "extrinsic." *See Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987). Jury exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment. *See Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). However, a petitioner is entitled to habeas relief only if it can be established that the exposure to extrinsic evidence had "substantial and injurious effect or influence in determining the jury's verdict." *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). Special deference must be given to the trial court's impression of the impact of extrinsic evidence. *See United States v. Plunk*, 153 F.3d 1011, 1024 (9th Cir. 1998), *amended by* 161 F.3d 1195 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

b. **Analysis**

Following the publication of a newspaper article about Petitioner's trial, the trial court determined whether any jurors had seen the article. (Rep. Tr. 362-65.) Juror No. One acknowledged that he had seen the article, but did not read it. No other jurors indicated that they had seen the article. Outside the presence of the jury, the trial court

1 conducted a voir dire and determined that Juror No. One saw the headline about a purse
2 snatcher and turned the page upon realizing that the article was about the defendant in
3 trial. The trial court also determined that Juror No. One did not read the article outside the
4 bold print on top, and did not form an opinion as to Petitioner's guilt or innocence as a
5 result of glancing at the newspaper article. Defense counsel, Ms. Brown, asked Juror No.
6 One about what he specifically saw in the headline, to which he responded "I think it said,
7 'opening testimony for purse snatcher' or something like that. That's about it." *Id.* at 365.
8 Ms. Brown did not further challenge Juror No. One, nor did the trial court remove him
9 from the jury.

10 Even relying solely on Juror No. One's own testimony, the trial court's inquiry into
11 the matter was sufficient to determine that Juror No. One had not actually read the
12 newspaper article. *See Smith v. Phillips*, 455 U.S. 209, 217 and n.7 (1982) (juror's own
13 testimony as to his impartiality is not inherently suspect). "Due process means a jury
14 capable and willing to decide the case solely on the evidence before it, and a trial judge
15 ever watchful to prevent prejudicial occurrences and to determine the effect of such
16 occurrences when they happen." *Id.* at 217. Based on Juror No. One's testimony that he
17 had not read the article, there was no reason for Brown to ask the trial court to remove him
18 from the jury or further challenge Juror No. One for misconduct. *See* Pet. 3f.

19 Furthermore, just before excusing the jury to conduct the voir dire of Juror No. One,
20 the trial court clearly instructed the jury not to "read any articles about this case in the
21 newspaper, because it's a direct contradiction of my order if you do so." (Rep. Tr. 363.)
22 Therefore, it was unnecessary for Brown to ask the trial court to further admonish Juror
23 No. One or the other jury members. Because Brown did not fall below an "objective
24 standard of reasonableness," her performance was not deficient. *Strickland*, 466 U.S. at
25 687-88. Accordingly, the claims of ineffective assistance of trial counsel are without
26 merit, and habeas corpus relief on those grounds is DENIED.

27 **II. Ineffective Assistance of Appellate Counsel**

28 Petitioner claims that he was denied the effective assistance of counsel on appeal
because appellate counsel did not raise claims of ineffective assistance of counsel on direct
appeal and did not augment the record.

1 **A. Legal Standard**

2 The Due Process Clause of the Fourteenth Amendment guarantees a criminal
3 defendant the effective assistance of counsel on his first appeal as of right. *See Evitts v.*
4 *Lucey*, 469 U.S. 387, 391- 405 (1985). Claims of ineffective assistance of appellate
5 counsel are reviewed according to the standard set out in *Strickland*. *Miller v. Keeney*, 882
6 F.2d 1428, 1433 (9th Cir. 1989). In order to prevail on an ineffective assistance of
7 appellate counsel claim, therefore, it must be established that counsel's performance was
8 deficient, see *Strickland*, 466 U.S. at 687-88, and that there is a reasonable probability that,
9 but for appellate counsel's unprofessional errors, the appeal would have prevailed. *Miller*,
10 882 F.2d at 1434 & n.9 (citing *Strickland*, 466 U.S. at 688, 694). Appellate counsel does
11 not have a constitutional duty to raise every nonfrivolous issue requested by a criminal
12 defendant. *See Jones v. Barnes*, 463 U.S. 745, 751-54 (1983); *Gerlaugh v. Stewart*, 129
13 F.3d 1027, 1045 (9th Cir. 1997); *Miller*, 882 F.2d at 1434 n.10. The weeding out of
14 weaker issues is widely recognized as one of the hallmarks of effective appellate
15 advocacy. *See Miller*, 882 F.2d at 1434. Consequently, appellate counsel ordinarily meets
16 an objective standard of competence and causes his client no prejudice where he declines
17 to raise a weak issue. *See id.*

18 **B. Analysis**

19 In the absence of a reasoned decision by a state court addressing Petitioner's
20 ineffective assistance of appellate counsel claim, the Court must conduct an independent
21 review of the record to ascertain whether the state court denial of this claim was
22 objectively unreasonable. *Himes*, 336 F.3d at 853.

23 Petitioner claims that he received ineffective assistance of appellate counsel, E.
24 Evans Young, because Young failed to argue on appeal that Petitioner received ineffective
25 assistance of trial counsel on the same basis that Petitioner challenges trial counsel's
26 performance in this petition. (Pet. 3g.) The Court has found that trial counsel was not
27 ineffective for failing to challenge the victim's in-court identification, failing to investigate
28 or present alibi witnesses, failing to challenge evidence of prior convictions at sentencing,
or failing to challenge a juror for misconduct. *See Section I, supra*. Consequently, there is
no reasonable probability of a different outcome on appeal had appellate counsel raised

1 these issues on appeal. *Strickland*, 466 U.S. at 694. The State court's dismissal of this
2 claim was not contrary to, or an unreasonable application of, *Strickland*. Accordingly, this
3 claim for relief is denied.

4 Petitioner also claims that appellate counsel failed to augment the record to include
5 the records introduced into evidence to prove the prior convictions at the sentencing phase
6 of trial. (Pet. 3g-3h.) An indigent defendant is entitled to "a record of sufficient
7 completeness" to prepare an appeal; irrelevant or extraneous portions of the transcript may
8 be omitted. *Mayer v. City of Chicago*, 404 U.S. 189, 194-95 (1971). "It is well-
9 established that 'the State must, as a matter of equal protection, provide indigent prisoners
10 with the basic tools of an adequate defense or appeal, when those tools are available for a
11 price to other prisoners.'" *Kennedy v. Lockyer*, 379 F.3d 1041, 1046 (9th Cir. 2004)
12 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). Here, the Reporter's trial
13 transcript provides a record of the evidence of Petitioner's prior convictions that was
14 presented by the prosecution. (Rep. Tr. 757-70.) This record meets Petitioner's right to a
15 record sufficient to afford adequate and effective appellate review, and Young's failure to
16 request augmentation of the record to include the evidence of Petitioner's prior convictions
17 does not fall below an "objective standard of reasonableness." *Strickland*, 466 U.S. at
18 687-88.

19 Even if Young's failure to augment the record was deficient, which it was not,
20 Petitioner fails to show that this failure caused prejudice, in other words, that there is a
21 reasonable probability that but for Young's error, Petitioner would have prevailed on
22 appeal. *Id.* at 694. The Reporter's transcript provides a sufficient alternative method of
23 recording the evidence of Petitioner's prior convictions introduced at the second phase of
24 the bifurcated trial. *See Mayer*, 404 U.S. at 194-95. The certified records at issue here
25 would only confirm the references in the trial transcript to the evidence of Petitioner's
26 prior convictions. Petitioner has not demonstrated that the documentary evidence at issue
27 would support his claim on appeal that there was insufficient evidence of his prior
28 convictions to support the sentence enhancements. Petitioner was not prejudiced by
counsel's performance, and his claim of ineffective assistance of appellate counsel
therefore fails.

1 **III. Severance**

2 Petitioner alleges that his right to due process was violated because the trial court
3 denied his motion to sever the trial of the Goodman robbery count from the attempted
4 robbery of the Kanouse count. On direct appeal, the California Court of Appeal upheld
5 the decision of the trial court to allow the two counts to proceed in a joint trial.

6 **A. Legal Standard**

7 A federal court may only grant a writ of habeas corpus where the trial court's failure
8 to sever separate counts "results in prejudice so great as to deny a defendant his Fifth
9 Amendment right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986).
10 "There is no prejudicial constitutional violation unless 'the simultaneous trial of more than
11 one offense ... actually render[ed] Petitioner's state trial fundamentally unfair and hence,
12 violative of due process.'" *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000) (*quoting*
13 *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991), *cert. denied*, 534 U.S. 943
14 (2001)). "This prejudice is shown if the impermissible joinder had a substantial and
15 injurious effect or influence in determining the jury's verdict." *Id.* Factors that may be
16 considered in determining whether joinder is unduly prejudicial include the joinder of
17 other crimes where the evidence would otherwise be inadmissible and the joinder of a
18 'weak' evidentiary case with a 'strong' one. *See id.*

19 **B. Analysis**

20 **1. Cross-Admissibility of Evidence**

21 This Court looks to the analysis of the Court of Appeal in evaluating Petitioner's
22 claim. *LaJoie*, 217 F.3d at 669 n.7.

23 There is a "high risk of undue prejudice whenever . . . joinder of counts allows
24 evidence of other crimes to be introduced in a trial of charges with respect to which the
25 evidence would otherwise be inadmissible." *United States v. Lewis*, 787 F.2d 1318, 1322
26 (9th Cir. 1986). Admission at trial of evidence of other crimes is inadmissible unless
27 relevant to prove an issue of fact in the case, such as motive, opportunity, intent, identity
28 or knowledge. *See United States v. Powell*, 587 F.2d 443 (9th Cir. 1978); Federal Rule of
Evidence 404(b); California Evidence Code 1101(b). Both the trial court and the
California Court of Appeal determined that the evidence of the two crimes would have

1 been cross-admissible if the offenses were separately tried. The admissibility of the
2 evidence under California law is a state law determination by which this Court is bound.
3 *See Hicks v. Feiock*, 485 U.S. 624, 629 (1988) (holding that a determination of state law
4 by a state appellate court is binding in a federal habeas action).

5 Although this court is bound by the state court's determination on cross-
6 admissibility of evidence, we must nevertheless determine whether this determination of
7 cross-admissibility deprived Petitioner of a fundamentally fair trial. First, we observe that
8 the trial court did not specify the issues for which the evidence of each count would have
9 been admissible as to the other. Rather, the trial court observed that the evidence would be
10 cross-admissible due to the "substantial similarity between the two crimes," which it
11 enumerated as the common elements of an "elderly women carrying a purse, the location,
12 [and] the time of day." (April 29, 1988 Rep. Tr. 13.) On direct appeal, the California
13 Court of Appeal upheld this determination, and further elucidated that the evidence of
14 each crime was cross-admissible as to the issue of "identity."

15 There is no question that the major element at issue in Count I was the identity of the
16 Elaine Goodman's assailant. Goodman picked Petitioner from a line-up and positively
17 identified him as her assailant. No other direct or circumstantial evidence implicated
18 Petitioner in that crime; accordingly, the trial as to Count I focused exclusively on the
19 reliability of Goodman's identification. Under California law, evidence of an uncharged
20 crime is admissible to prove identity through a distinctive modus operandi. Cal. Evid.
21 Code § 1101. In upholding the trial court, the California Court of Appeal found that
22 evidence of a modus operandi existed:

23 Pursuant to Evidence Code section 1101, subdivision (b), the evidence of
24 each robbery would have been admissible to establish identity, intent,
25 motive, or plan. To be admissible to demonstrate a distinctive modus
26 operandi, the evidence must disclose common marks or identifiers that
27 support a strong inference that the defendant committed both crimes. In our
view, the evidence here was admissible to show identity. The two robberies
were committed in a similar manner: the victim in both cases was an elderly
woman alone on a public street, the robberies were both purse snatchings,
and they occurred in the daytime within one and one-half blocks of each
other. The two crimes would have been cross-admissible if the offenses had
been separately tried.

28 (May 8, 2000 slip op. at 5.) This Court finds that the state court did not err in determining
that the similarities between the two crimes supported an inference that they were

1 committed by the same actor. *See, e.g., Davis v. Woodford*, 384 F.3d 628, 639 (9th Cir.
2 2004) (noting that California Supreme Court determined that two crimes were cross-
3 admissible where the incidents were “similar in nature, occurred only a few hours apart,
4 and were in close geographic proximity.”)

5 Identity was not an issue in Count 2, however, because Petitioner was identified at
6 the scene of the crime and apprehended shortly thereafter. Instead, the issue at dispute in
7 Count 2 was whether Petitioner had the requisite intent and knowledge that his daughter
8 would attempt a robbery. The state court decision does not expressly determine that the
9 evidence from Count 1 would have been admissible to show intent and knowledge in a
10 separate trial on Count 2. However, to be relevant on the issue of intent under California
11 law, the degree of similarity between the two crimes need not be as high as that required to
12 prove identity. *See, e.g., People v. Ewoldt*, 7 Cal. 4th 380, 402 (1994) (holding that the
13 “least degree of similarity” between two offenses is required to prove intent.). To
14 establish intent, the two crimes “need only be sufficiently similar to support the inference
15 that the defendant probably harbored the same intent in each instance.” *People v. Kipp*, 18
16 Cal.4th 349, 371 (Cal. 1998) (citations omitted). Because the California Court of Appeal
17 found the crimes sufficiently similar to meet the heightened standard for proving identity,
18 it follows that the crimes were also similar enough to prove intent, which requires less
19 similarity. Accordingly, despite the state court’s failure to explicitly determine that
20 evidence in Count 1 would be specifically admissible to prove intent in Count 2, the state
21 court’s determination that the crimes were sufficiently similar to prove identity in Count 1
22 implies that there was also sufficient similarity to prove intent in Count 2.

23 Consequently, the “high risk of undue prejudice” occurring when joinder allows
24 otherwise inadmissible evidence to be introduced is not implicated by Petitioner’s case,
25 because the evidence of each crime was admissible to prove an element of the other.
Lewis, 787 F.2d at 1322.

25 **2. Simple and Distinct Evidence**

26 Even if the evidence of the two crimes were not cross-admissible, joinder would not
27 necessarily result in prejudice so long as the evidence of each crime is simple and distinct
28 and the jury is properly instructed so that it may compartmentalize the evidence. *Davis v.*

1 *Woodford*, 384 F.3d 628, 639 (9th Cir. 2004). A review of the record indicates that the
2 trial was conducted in a sequential manner, with evidence from Count 1 presented to
3 completion, followed by Count 2. Each count involved separate witnesses testifying to
4 events which took place on separate days. There is little chance that the jury was confused
5 as to which crime each piece of evidence related. Only once during closing argument did
6 the state urge the jury to consider the evidence for the two crimes in concert, and that was
7 on the issue of identity in Count 1, which, as discussed, was clearly permissible.⁷
8 Moreover, the trial court's jury instructions included the following admonition: "Each
9 count charges a distinct crime. You must decide each count separately. The defendant
10 may be found guilty or not guilty of any or all of the crimes charged in Count One and
11 Two. Your finding as to each count must be stated in a separate verdict." (Rep. Tr. 741-
12 42.) Given the simple and distinct evidence on each count and the trial court's instruction
13 to decide the counts separately, this Court finds that Petitioner was not prejudiced by the
14 joinder.

3. Weight of Evidence

4 Finally, Petitioner makes several arguments concerning the nature and relative
5 weight of the evidence in the two counts. First, Petitioner argues that his case presented an
6 instance of the state joining a strong evidentiary count with a weaker count, which created
7 a "spill over" effect allowing the jury to infer guilt on the weaker count based upon the
8 evidence from the stronger count. Second, where accomplice testimony in Count 2
9 required corroboration, Petitioner argues that joinder impermissibly allowed the jury to use
10 evidence from Count 1 to corroborate this testimony in Count 2. Third, he asserts that
11 evidence that he used his daughter to commit a robbery was inflammatory and might
12 prejudice the jury against him with regard to Count 1.

13 According to Petitioner, Count 2 was a weaker case, because the state had to prove
14 that he had the knowledge and intent to commit robbery when his daughter approached
15

16 ⁷ In his closing argument, the prosecutor stated, "And it's funny if you look at just the
17 August 11 all by itself. All you have is Elaine Goodman's testimony and her identification of
18 him, gives a description and picks him out of the lineup. That's not all you have. Now, you
19 have the other robbery and you can see all the similarities. The only difference, he did this
20 with his daughter the second time. But it was the same location, at the same time, the same
21 type of victim, doing the same type of crime." (Rep. Tr. 679.)

1 Mrs. Kanouse, and his daughter's testimony regarding his intent had to be corroborated by
2 other independent evidence.⁸ Clearly, a danger of prejudice arises when a strong case is
3 joined with a weak case, in that the jury could impermissibly infer "because he did it
4 before, he must have done it again." *Bean v. Calderon*, 163 F.3d 1073, 1085 (9th Cir.
5 1998) (quoting *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985)). However, the
6 evidence supporting Count 2 was neither weak, nor significantly less compelling than the
7 evidence supporting Count 1. In proving the element of intent in Count 2, the state offered
8 not only the testimony of Petitioner's daughter, but also presented evidence that Petitioner
9 kept the car running while his daughter made the attempt and then, after she got into his
10 car, sped away from a police officer in pursuit on a bicycle. Furthermore, this Court
11 agrees with the California Court of Appeal's determination that because the evidence
12 regarding neither count was weak, there was no danger of "spill over" from a stronger case
13 to a weaker case. *See People v. Sandoval*, 4 Cal. 4th 155, 173 (1992).

14 Petitioner also argues that any corroborating evidence derived from Count 2 was
15 weak and circumstantial, and that the jury impermissibly relied on the evidence from
16 Count 1 to corroborate his daughter's incriminating statements. As noted above, there was
17 adequate evidence from Count 2 to corroborate Petitioner's daughter's testimony on intent.
18 Moreover, Petitioner is incorrect when he asserts, without citation to authority, that any
19 corroboration "had to come ONLY from facts presented as to Count II, and none from
20 Count I." Pet. Supp. Traverse at 2. The trial court's instructions to the jury defined
21 corroboration simply as "evidence of some act or fact related to the crime which, if
22 believed by itself without any aid, interpretation, or direction from the testimony of the
23 accomplice, tends to connect the defendant with a commission of the crime charged."
24 (Rep. Tr. 738.) Contrary to Petitioner's assertion, the law does not require that such
25 corroborative evidence be derived solely from facts of the crime itself – only that the
26 evidence should be independent of the accomplice testimony and relate to an act or fact
27 which is an element of the crime. *See Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir.
28

29
30 ⁸Although Petitioner's daughter made statements that Petitioner intended the robbery
31 (which she recanted at trial), a defendant may not be found guilty based upon the testimony
32 of an accomplice unless that testimony is corroborated by independent evidence tending to
33 prove the element at issue. (Rep. Tr. at 738-39.)

1 2000) (corroboration required by Section 1111 of the California Penal Code “need not
2 corroborate every fact to which the accomplice testified or establish the corpus delicti, but
3 is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy
4 the jury that the accomplice is telling the truth.”) (citations omitted); *People v. Garcia*, 84
5 Cal.App.4th 316, 325 (Cal.App. 1st Dist. 2000) (corroborating evidence “must be related
6 to some act or fact, which is an element of the crime, though it need not be sufficient in
7 itself to establish the elements of the crime.”) As discussed above, the evidence of
8 Petitioner’s involvement in Count 1 was admissible in Count 2 on the issue of intent, and
9 was wholly independent from the testimony of Petitioner’s daughter. Consequently, the
10 jury could permissibly rely on such evidence to corroborate the accomplice testimony
regarding the element of intent.

11 Petitioner’s final argument regarding the nature of the evidence is that evidence that
12 he used his daughter to commit the robbery in Count 2 was inflammatory and unduly
13 prejudiced the jury against him with regard to Count 1. One of the factors to be
14 considered under California law on a motion to sever is whether “certain of the charges are
15 unusually likely to inflame the jury against the defendant.” *Sandoval*, 4 Cal.4th at 172-173
16 (1992). As the California Court of Appeal observed, “the danger to be avoided in joinder
17 of offense is that strong evidence of an inflammatory offense might be used to bolster a
18 weak case on another offense.” (May 8, 2000 slip op. at 5 (citing *People v. Hill*, 34
19 Cal.App.4th 727, 734 (1995)). Petitioner himself admits that the evidence from Count 1
20 was not weaker than the evidence presented in Count 2, which included the purportedly
21 inflammatory element. This Court finds that the considerable strength of both cases
22 against Petitioner obviated any danger that inflammatory evidence would bolster a weaker
23 case, and thus Petitioner was not unduly prejudiced by the joinder of the counts.

24 It is the conclusion of this Court that the evidence of the two crimes was cross-
25 admissible, so denial of severance was not unduly prejudicial. Furthermore, the evidence
26 of the two crimes was simple and distinct, and neither case was significantly weaker than
27 the other. *See Sandoval*, 241 F.3d at 773. Petitioner’s due process rights were not violated
28 by the trial court’s denial of severance, so the California courts’ denial of this claim was
not contrary to, or an unreasonable application of, clearly established United States

1 Supreme Court authority.

2 **IV. Other Acts Evidence**

3 In Claim Four, Petitioner contends that the trial court erred in admitting evidence of
4 Petitioner's statements that he wanted to avoid going back to jail and knew where to find a
5 gun that had been used in a murder. Petitioner also claims that his trial counsel's failure to
6 object to the evidence constituted ineffective assistance of counsel. Neither of these
7 contentions merit habeas relief.

8 **A. Legal Standard**

9 A federal court cannot disturb on due process grounds a state court's decision to
10 admit evidence of prior crimes or bad acts unless the admission of the evidence was
11 arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *See Walters v.*
12 *Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th
13 Cir.), *cert. denied*, 479 U.S. 839 (1986). The admission of other crimes evidence violates
14 due process where there are no permissible inferences the jury can draw from the evidence
15 (in other words, no inference other than conduct in conformity therewith). *See McKinney*
16 *v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993); *Jammal v. Van de Kamp*, 926 F.2d 918, 920
17 (9th Cir. 1991).

18 **B. Analysis**

19 The Court of Appeal, the highest state court to issue a reasoned decision on this
20 claim, determined that Petitioner's claim had no merit. At trial, one of the arresting
21 officers on August 26, 1997, Officer Morse, testified that when Petitioner was handcuffed
22 and sitting in the backseat of a police car, "I asked him if he knew anything about any
23 homicides or anything that might – we might be able to talk to him about and maybe help
24 him out on this case." (Rep. Tr. 358.) Officer Morse further testified that Petitioner
25 "stated something to the effect that he knew where a gun was hidden that was used in a
26 murder." *Id.* Officer Morse told Officer Wolvington about Petitioner's statement. Officer
27 Wolvington testified on direct examination as follows:

28 Q: At some point, did either Officer Mores [sic] or Officer Perez speak with you
about the defendant?

A: Yes, sir.

Q: And what did they tell you, if can you recall?

A: That he wanted to work with them.

...

1 Q: After you were told that, what did you do next with that information?
 2 A: Talked to Mr. Best and he was courteous to lead me to the gun that was used
 in a murder.
 3 Q: And how did this come up? What was the discussion surrounding the gun?
 4 A: He wanted to work with the police to lessen his conviction.
 MS. BROWN: Objection. Speculation.
 THE COURT: Lay the objection. Sustained. Lay a greater foundation.
 The answer is stricken.
 5 MR. HERMAN: Q. What words did he use with you? Why was he
 6 willing to provide you information?
 A: Because he told me he just gotten out of jail, didn't want to go back. For
 7 supplying this, he worked with me. If he could take me to the gun, I would
 not press the charges.
 Q. Okay. Did he lead you to a gun?
 A. Yes, sir, he did.
 . . .
 Q: And could you describe the gun?
 A: Was a poor gun. I couldn't find the serial numbers. Wore out notches on the
 handle.
 Q: Okay. What did you do with it?
 A: I turned it in as evidence to the Oakland Department Section.

12 (Rep. Tr. 366-68.)

13 The Court of Appeal rejected Petitioner's challenge to the admission of this
 4 evidence on direct appeal and reasoned "[a]s the prosecutor argued below, appellant's
 5 statement supported an inference of consciousness of guilt. While appellant argues that
 6 his trial counsel should have objected to the evidence as irrelevant, the trial court was not
 7 obligated to exclude it. The trial court could well have concluded that the probative value
 8 of the evidence outweighed its prejudicial effect." (May 8, 2000 slip op. at 6.)

19 Petitioner argues that the evidence of his statement and actions leading to the
 20 recovery of the gun was prejudicial in two ways: the evidence informed the jury that
 21 Petitioner was previously incarcerated and that he knew where a murder weapon was
 22 located, which would allow jury to infer criminal activity. The record, however, does not
 23 indicate that the evidence had prejudicial effect. The testimony about Petitioner's
 24 statements did not divulge any information about why Petitioner had been in jail earlier, or
 25 what prior crimes he had committed or had been charged with. Furthermore, Sergeant
 26 Yoell subsequently testified that after he spoke to Officer Wolvington about the recovered
 27 gun, he contacted homicide investigators and, to his knowledge, the gun did not lead to
 anything, that is, any homicide investigation. (Rep. Tr. 433.)

28 Petitioner argues that even if his statements were admissible as evidence of

1 consciousness of guilt, the lack of a limiting instruction rendered the admission of the
2 evidence of the gun prejudicial. (Pet. for Review in Cal. Supreme Ct. at 8, incorporated by
3 reference into Pet.) There is clearly established law that a criminal defendant has a due
4 process right to adequate instructions on his theory of the case. *Conde v. Henry*, 198 F.3d
5 734, 739 (9th Cir. 2000). Due process requires that an instruction be given if the evidence
6 supports it. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982); *Miller v. Stagner*, 757 F.2d
7 988, 993 (9th Cir.), *amended*, 768 F.2d 1090 (9th Cir. 1985). The significance of the
8 omission of an instruction is evaluated by a comparison of the omitted instruction with the
9 instructions that were given. *Murtishaw v. Woodford*, 255 F.3d 926, 971 (9th Cir. 2001)
10 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 156 (1977)). Consequently, whether the
11 failure to issue an instruction violates due process will depend on the evidence presented
12 as well as the overall instructions received by the jury. *Duckett v. Godinez*, 67 F.3d 734,
13 745 (9th Cir. 1995).

14 Here, Sergeant's Yoell's testimony that the gun did not lead to evidence of any
15 crimes forecloses any inference that Petitioner was involved in a murder or other crime
16 involving that gun. Furthermore, the prosecution argued in closing that Petitioner's
17 statement indicated consciousness of guilt, and did not insinuate that Petitioner had
18 committed a crime with the gun. After referring to Petitioner driving quickly away from
19 the scene of the robbery, the prosecutor argued "Why else would he be taking off like that?
20 Why else drive like that? Look at the conduct. What does he do? He says to the police
21 officer, 'Hey, man I don't want to get in trouble or something like this? I know a gun that
22 was used in a 187. I'll show you where there's a gun.' What's that. Isn't that
23 consciousness of guilt? Isn't that kind of like saying, got caught, let me give you
24 something, let me give you something that's going to help. That's exactly what that is."
25 (Rep. Tr. 677.) The trial court's omission of a limiting instruction, in light of Officer
26 Yoell's testimony and the limited use of Petitioner's statement to prove consciousness of
27 guilt, was not so prejudicial as to render the trial fundamentally unfair.

28 Petitioner further argues in Claim Four that trial counsel Brown's failure to object to
admission of Petitioner's statements about the gun constitutes ineffective assistance of
counsel. As discussed above, even if Brown's failure to object amounts to deficient

1 performance, the admission of the evidence did not cause prejudice and therefore does not
2 demonstrate ineffective assistance of counsel. This claim is therefore denied.

3 **CONCLUSION**

4 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.
5 Respondent's objections to the order granting Petitioner's motion to expand record are
6 OVERRULED (docket no. 38). The Clerk shall enter judgment in favor of Respondent
7 and close the file.

8 **IT IS SO ORDERED.**

9 DATED: September 29, 2005

10 
11 JEFFREY S. WHITE
12 United States District Judge